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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

THE PEOPLE, Plaintiff and Respondent, v. JOHN ROBERT MCALLISTER, Defendant and Appellant.	C042221 (Sup.Ct.No. NCR57372)

Defendant John Robert McAllister entered a negotiated plea of guilty to two counts of auto burglary (Pen. Code, § 459; undesignated section references are to this code; counts I and II), and one count of receiving stolen property (§ 496, subd. (a); count III), admitted a strike prior (§§ 667, subds. (b)-(i), 1170.12), and a prior prison term (§ 667.5, subd. (b)) in exchange for a sentencing lid of nine years eight months, and the dismissal of the remaining counts [sale, transfer or

conveyance of access card with intent to defraud (§ 484e, subd. (a); count IV); vandalism (§ 594, subd. (a); count V); possession of burglary tools (§ 466; count VI)], and allegation [another strike prior].

The court denied probation and sentenced defendant to state prison for an aggregate term of eight years four months [count I, six years - the upper term of three years, doubled for the strike prior; count II, 16 months - a consecutive one-third the two-year midterm, doubled for the strike prior; count III, six years concurrent; one year for the prior prison term].

Defendant appeals. His request for a certificate of probable cause (§ 1237.5) was denied.

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief.

Defendant filed a supplemental brief. He contends (1) counsel rendered ineffective assistance, (2) the prior convictions were never proven, (3) the plea agreement was illegal and (4) the trial court abused its discretion at sentencing. We consider defendant's contentions seriatim.

I

Defendant first contends he was denied the effective assistance of counsel and lists numerous complaints, most of

which concern counsel's performance prior to defendant's entry of his plea and thus attack the validity of the plea.[1] These

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[1] "1. Counsel failed and/or refused to submit illegal search and seizure motion (Penal Code 1538.5) despite client's request.

"[¶] . . . [¶]

"4. On attorney's [advice] and because of his ignorance of law, I admitted to alleged, unproven out-of-state convictions. These convictions were alleged to constitute 'Strikes' under California's Three Strikes Law.

"5. Counsel failed and/or refused to listen to client, when client tried to explain to attorney that the alleged out-of-state prior convictions were committed in Delaware, not Illinois as stated on the charge sheet and on the record. . . .

"6. Counsel failed and/or refused to advise me about the facts of law concerning out-of-state past prior convictions.

"7. Counsel failed and/or refused to adequately or properly investigate the validity of my past out-of-state prior convictions to confirm if they qualified as 'strikes' according to California statutes.

"8. Counsel failed and/or refused to advise client that I could contest out-of-state prior convictions.

"9. Counsel failed and/or refused to explain to client consequences of admitting to past priors without them first being proven. . . .

"10. Counsel failed and/or refused to communicate with client concerning past prior convictions. . . .

"11. Counsel failed and/or refused to advise me of my constitutional rights against self-incrimination when advising me to admit to past prior convictions. . . .

"12. As a result of attorney's ineptitude and/or incompetence concerning the validity of my past out-of-state convictions, my sixth and fourteenth amendment of the United States Constitution was violated. [*Sic.*]

"13. Counsel failed and/or refused to make a motion or take a proper legal procedure to have 'strikes' proven by prosecutor. . . .

"14. On February 12, 2002, counsel waived arraignment on the amended information. . . .

"15. As a result of attorney's ineptitude and/or incompetence concerning the validity of my past out-of-state prior convictions, plea agreement and convictions were obtained under false pretenses.

"[¶] . . . [¶]

"18. I did not discover until recently that attorney was deceiving me and/or not telling me the truth about the facts of law concerning my past out-of-state convictions.

"19. Prosecutor alleges that I have two 'strikes.' I recently discovered one 'strike' is invalid. (One strike was dismissed shortly after conviction. I would not have agreed to a maximum term in the plea agreement if I was aware of this fact.)

"20. As a result of attorney's omissions, negligence, ineptitude, lack of preparation, inadequate knowledge of the law, and/or other reasons, I was forced or coerced into accepting an illegal plea agreement.

"21. Plea agreement was obtained through the use of extortion by the prosecutor and by my attorney as they continuously threatened me with 25 years to life in prison if I did not accept the plea agreement. . . .

"22. I would **not** have entered into plea agreement if I was aware of the facts of the law concerning the validity of out-of-state prior convictions ('strikes'). 'If properly informed by attorney.'

"23. I would **not** have entered into a plea agreement if I was aware of the facts of law concerning the validity of out-of-state prior convictions.

"24. I would **not** have entered into a plea agreement if **I was** aware of Penal Code 1385 -- The Court has the discretion to dismiss prior convictions in the furtherance of justice; Romero.

"25. I would **not** have entered into plea agreement if attorney informed and/or advised me of Penal code 1385.

"26. Attorney at the very least should have had out-of-state prior convictions proven. (Then I could have made an informed and intelligent decision of whether I wanted to go to trial or not.)

"[¶] . . . [¶]

"36. My attorney led me to believe that I would be receiving a **3 to 6 year term**. My plea agreement states up to 9 years and four months. I asked my attorney why the plea agreement does not state the exact amount of time. Quoting verbatim, my attorney's response was: 'that's how we do things in California. It's up to the judge what term you receive at sentencing.' Again, my attorney both lied and deceived me.

"37. Counsel also stated that it was a "No Brainer" as if I were stupid when I declined to accept the plea agreement." (Original emphasis.)

complaints are noncognizable on appeal because defendant failed to obtain a certificate of probable cause.

"A defendant who has pleaded guilty . . . to a charge in the superior court, and who seeks to take an appeal from a judgment of conviction entered thereon" must obtain a certificate of probable cause to attack the legality of the proceedings as well as the validity of the plea. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1088 (*Mendez*); § 1237.5; Cal. Rules of Court, rule 31(d).)[2]

"Section 1237.5 has as its purpose 'to promote judicial economy' [citation] 'by screening out wholly frivolous guilty [and nolo contendere] plea appeals before time and money are spent' on such matters as the preparation of the record on appeal [citation], the appointment of appellate counsel [citation], and, of course, consideration and decision of the appeal itself." (*Mendez, supra,* 19 Cal.4th at p. 1095.)

"Under section 1237.5 and rule 31(d), first paragraph, the Court of Appeal generally may not proceed to the merits of the appeal, but must order dismissal thereof, unless the defendant

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[2] Section 1237.5 provides: "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty . . . except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

. . . has obtained a certificate of probable cause, in full compliance therewith." (*Mendez, supra,* 19 Cal.4th at p. 1099.)

Defendant's complaints concerning counsel's performance prior to the entry of the plea attack the validity of the plea and review on appeal on the merits is barred by defendant's failure to obtain a certificate of probable cause. (§ 1237.5.) We consider defendant's remaining complaints about counsel's performance under the following standards.

To establish ineffective assistance of counsel, defendant must demonstrate that counsel's performance was deficient and that defendant suffered prejudice as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 689, 691-694 [80 L.Ed.2d 674, 693-694, 696-698]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

We reject a claim of ineffective assistance of counsel "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." (*People v. Wilson* (1992) 3 Cal.4th 926, 936.) Unless the record shows that "counsel had no rational tactical purpose for his act or omission[,] . . . the conviction will be affirmed and the defendant relegated to habeas corpus proceedings at which evidence dehors the record may be taken to determine the basis, if any, for counsel's conduct or omission." (*People v. Fosselman* (1983) 33 Cal.3d 572, 581-582.)

Defendant complains, "2. Counsel failed and/or refused to submit Notice of Appeal despite client specifically requesting attorney to do so. . . .

"3. Counsel failed and/or refused to acknowledge clients [*sic*] request concerning Notice of Appeal."

Defendant was granted relief from default and filed a belated notice of appeal so he suffered no prejudice even if counsel's performance was deficient.

"17. I was misinformed throughout the entire proceedings concerning my out[-]of[-]state prior convictions ('strikes')."

This claim is vague and any complaint concerning counsel's performance prior to the plea is noncognizable. (§ 1237.5.)

Defendant lists the following complaints:

"16. Counselor failed and/or refused to advise client that the judge has the discretion to dismiss 'strikes' in the furtherance of justice. . . .

"[¶] . . . [¶]

"27. Counsel failed and/or refused to explain consequences of probation report (especially the aggravating and mitigating section).

"[¶] . . . [¶]

"31. Because of attorney's incompetence, I had approximately ten minutes before sentencing to review probation report in a holding cell with fifteen screaming inmates. In those ten minutes, while in hand-cuffs and shackles, I was suppose [*sic*] to read the entire report, comprehend it, and inform my attorney of what I disagreed with.

"32. . . . I complained to the attorney that I did not have enough time to read the probation report. The attorney's comment was: 'You had plenty of time, most inmates don't even read the report.' I then asked the attorney if I could have a copy of the report. The attorney's response was: 'If you have money on your books, you can buy a copy of the probation report for ten cents a copy.' . . . I had to buy my own probation report just so I could read the report. . . .

"33. I was in the Tehama County Jail, facing 25 years to life, for 102 days, and I saw my attorney for less than 30 minutes total -- aside from 2 minutes prior to entering the courtroom and whatever amount of time spent inside the courtroom.

"34. Everytime [*sic*] I asked the attorney a question in the courtroom, he said: 'Be quiet, I will explain later.' But later never came."

There is nothing in the record to support any of these claims.[3] We reject defendant's claim of ineffective assistance of counsel.

II

Defendant next contends that the prior convictions were never proven:

"1. Alleged out of state prior convictions were never proven.

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[3] Defendant's remaining claims numbered 28 through 30, 35, 38 and 39, will be considered in our discussion in part IV, *ante*.

"2. Prosecutor alleges out of state prior convictions were in Illinois. Prosecutor has the wrong state; alleged prior convictions were in Delaware, not Illinois, and do not constitute as 'strikes' under California law.

"3. Prosecutor failed to prove the validity of out of state prior convictions ('strikes'). . . .

"4. Prior out-of-state convictions were unconstitutional. The statutes were before the Supreme Court involving duplicity and/or multiplicity concerning the legality of the statutes. [Citations.]"

Defendant admitted, inter alia, one strike prior in exchange for dismissal of, inter alia, the other strike prior. The strike prior was proven by defendant's admission. Although the probation report reflects that the priors were from Delaware, the amended information and entry of plea hearing reflect that the prior admitted was from Illinois. In any event, the issue of the validity of the strike, whether the offense constituted a "strike" under California law, and the constitutionality, are noncognizable since defendant failed to obtain a certificate of probable cause. (§ 1237.5; *Mendez, supra,* 19 Cal.4th at p. 1088.)

III

Defendant next contends the plea agreement was illegal:

"1. Penal Code 667 (g) and 1170.12 (e) -- prior felony convictions **shall not** be used in plea bargaining as defined in subdivision (b) of section 1192.7.

"2. Penal Code 1192.7 (a) -- plea bargaining in any case in which the indictment or information charges any serious felony is **prohibited**.

"3. My plea bargain was based solely on prior felony convictions. Despite that, it is against the law. Attorney advised me: 'Take this plea or go to trial and receive 25 years to Life in prison.'

"[¶] . . . [¶]

"5. The trial court which approves a plea bargain in a serious felony case is required to indicate on the record which exceptions to the rules which generally prohibit plea bargains for serious felony is applicable. People v. Blackburn, 86 Cal.Rptr.2d 134 (1999)

"6. To be valid, a guilty plea must be voluntarily [*sic*] and intelligent. A guilty plea is '**UNINTELLIGENT**' if a defendants [*sic*] plea decision is based on [advice] from counselor that is not within the range of competence demanded of attorneys in criminal cases, or if defendant for any reason lacks **sufficient awareness** of the facts of the law. [Citations.]" (Original emphasis.)

These claims in substance attack the validity of the plea. Defendant's failure to obtain a certificate of probable cause

precludes review. (§ 1237.5; *Mendez, supra,* 19 Cal.4th at p. 1088.)

"4. Amended information sheet alleges two past prior serious felonies. (What happened to the other alleged past prior?) Neither the court or the prosecutor made a motion to dismiss any of these priors [pursuant to section 1385] . . . ."

The plea bargain required the dismissal of the other 1990 strike prior and counts IV, V and VI. The record reflects that this was not done. We will modify the judgment to correct this error.

IV

Defendant also contends the trial court abused its discretion in imposing the upper term on count I and a consecutive sentence on count II. Anticipating that this court will find the issue is waived for failure to object, defendant claims counsel rendered ineffective assistance of counsel. Defendant claims:

"28. Counsel failed and/or refused to object or argue to the use of 'upper term' at sentencing.

"29. Counsel failed and/or refused to object or argue the use of consecutive sentence at sentencing.

"30. On May 6, 2002, counsel again waived arraignment before sentencing. Again, this was an opportune time to object to probation report, use of upper term, and consecutive sentence.

"[¶] . . . [¶]

"35. A competent attorney would have been aware of the 'Scott' decision -- defendant waiver of appeal rights by not objecting at sentencing. People v. Scott, 36 Cal.Rptr.2d. 627 (1994).

"[¶] . . . [¶]

"38. Under existing law, a defense attorney who fails to adequately understand the available sentencing alternatives, promote their proper application, or pursue the most advantageous disposition for his client, he may be found incompetent. People v. Cotton, 284 Cal.Rptr. 757 (1991).

"39. Finally, I did not receive any benefit of a plea bargain. I received the maximum sentence because both my attorney and the prosecutor lied to me and deceived the court."

Defendant claims "the record does not permit for intelligent review" because the court failed to state reasons for its sentence choices. Not so. Despite defendant's claims to the contrary, the trial court did not simply "[i]ncorporate by reference the enumeration of aggravating and mitigating factors in Probation Report" or rely "on the same aggravating factors to impose Upper Term and Consecutive Term" or use a single fact to both impose the upper term on count I and impose the enhancement.

In imposing the upper term, the trial court cited defendant's numerous prior convictions other than those alleged as strikes and that defendant had served a prior prison term other than the one he admitted. The 49-year-old defendant was convicted in 1988 for issuing a bad check, a misdemeanor, in

1991 for robbery, attempted robbery, possession of a deadly weapon, felony escape, carrying a concealed weapon and three counts of receiving stolen property, and in 1998, auto burglary. He was sent to prison in 1991 and again in 1998. Prior to the imposition of sentence, defense counsel objected to the probation report's listing as aggravating factors prior violent conduct, the strike prior, and planning since the current offenses were smash and grab auto burglaries demonstrating no sophistication.

Defense counsel did object to the probation report's reliance upon certain aggravating factors. Defendant has failed to demonstrate that counsel's performance was deficient in that the trial court's imposition of the upper term is supported by the record.

For count II, the court imposed a consecutive one-third of the two-year midterm or 8 months doubled to 16 months for the strike prior. The trial court cited separate times and places to run count II consecutive to count I. Defense counsel did not object. Defendant argues:

"12. . . . The crimes I was accused of were **not** predominantly independent of each other, there was **no** violence or threats of violence, and it was a single period of aberrant behavior.

"13. The crimes I was accused of 'occurred on the same occasion and arose from the same set of operative facts.' Neither section 667, subd. (c)(6), nor section 1170.12 subd. (A)(6), mandates imposition of consecutive terms."

Counts I and II, both vehicle burglaries, occurred on the same day on the same street in Corning. One vehicle burglary occurred in the late morning near the Wellness Center and the other occurred in the early afternoon near the Olive Pit Restaurant. Defendant has failed to demonstrate that counsel's performance was deficient in that the facts underlying the offenses supported imposition of consecutive sentences for the reason stated by the trial court, separate times and places.

Contrary to defendant's claim, he did not receive the maximum sentence. Defendant was promised no more than nine years eight months and received more than one year less, that is, eight years four months.

Defendant finally claims, "18. I did not have an opportunity to review and challenge inaccuracies in the pre-sentence report. (Another example of attorney's negligence and incompetence.)"

Defendant was represented by counsel who did challenge the probation report's reliance on certain aggravating factors.

Having undertaken an examination of the entire record, we find no other arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is modified, dismissing the remaining counts [sale, transfer or conveyance of access card with intent to defraud (§ 484e, subd. (a)), count IV; vandalism (§ 594, subd. (a)), count V; possession of burglary tools (§ 466), count VI]

and the other strike prior allegation. As modified, the judgment is affirmed.

MORRISON, J.

We concur:

DAVIS, Acting P.J.

KOLKEY, J.